

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HORACIO LAMARCHE,

Plaintiff,

-against-

**ANSWER TO AMENDED
COMPLAINT ON
BEHALF OF SERGEANT
JAVIER AGOSTO**

10 CV 561 (FB) (LB)

SERGEANT JAVIER AGOSTO, CITY OF
NEW YORK, and NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES,

JURY TRIAL DEMANDED

Defendants.

X

Defendant, SERGEANT JAVIER AGOSTO (“Agosto”), by John V. Decolator, Esq., trial counsel to Tanner & Ortega, LLP, for his Answer to the Amended Complaint, respectfully alleges, upon information and belief, as follows:

1: Denies the allegations set forth in paragraph “1”, except admits that plaintiff purports to seek the relief stated therein, that plaintiff purports to invoke the Court’s jurisdiction as stated therein, and further states that the allegations referring to “under color of law” set forth conclusions of law rather than averments of fact, to which no response is required.

2: Denies having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “2”.

3: Denies having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “3”, except admits that Agosto was and still is employed by the New York City Department of Homeless Services and is a

resident of Kings County.

4: Denies having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "4" and refers all questions of law to this Honorable Court.

5: Denies the allegations set forth in paragraph "5", except admits that on or about April 28, 2007 Agosto was employed by the New York City Department of Homeless Services, and further states that the allegations referring to "under color of law" set forth conclusions of law rather than averments of fact, to which no response is required.

6: Denies the allegations set forth in paragraph "6".

7: In response to the allegations set forth in paragraph "7", Agosto repeats and realleges his responses to paragraphs "1" through "6", inclusive of this answer, as if fully set forth herein.

8: Denies the allegations set forth in paragraph "8".

9: Denies the allegations set forth in paragraph "9".

10: Denies the allegations set forth in paragraph "10", except admits that on or about April 28, 2007 plaintiff was observed listening to a radio.

11: Denies the allegations set forth in paragraph "11".

12: Denies the allegations set forth in paragraph "12", except admits that on or about April 28, 2007 plaintiff was observed listening to a radio.

13: Denies the allegations set forth in paragraph "13".

14: Denies the allegations set forth in paragraph "14".

15: In response to the allegations set forth in paragraph "15", Agosto repeats and realleges his responses to paragraphs "1" through "14", inclusive of this answer, as if fully set forth herein.

16: Denies the allegations set forth in paragraph "16", and further states that the allegations referring to "under color of law" set forth conclusions of law rather than averments of fact, to which no response is required.

17: Denies the allegations set forth in paragraph "17".

18: Denies the allegations set forth in paragraph "18".

19: Denies the allegations set forth in paragraph "19".

20: Denies the allegations set forth in paragraph "20".

21: In response to the allegations set forth in paragraph "21", Agosto repeats and realleges his responses to paragraphs "1" through "20", inclusive of this answer, as if fully set forth herein.

22: Denies the allegations set forth in paragraph "22".

23: Denies the allegations set forth in paragraph "23".

24: Denies the allegations set forth in paragraph "24".

25: Denies the allegations set forth in paragraph "25".

26: Denies the allegations set forth in paragraph "26".

27: Denies the allegations set forth in paragraph "27".

28: Denies the allegations set forth in paragraph "28".

29: Denies the allegations set forth in paragraph "29".

30: Denies the allegations set forth in paragraph "30".

31: In response to the allegations set forth in paragraph "31", Agosto repeats and realleges his responses to paragraphs "1" through "30", inclusive of this answer, as if fully set forth herein.

32: Denies the allegations set forth in paragraph "32".

33: Denies the allegations set forth in paragraph "33".

34: Denies the allegations set forth in paragraph "34".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

35: The Amended Complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

36: At all times relevant to the acts alleged in the amended complaint, defendant Agosto was attempting to effect a lawful arrest; thereupon, in order to effect the arrest, defendant Agosto placed the plaintiff in handcuffs and escorted him from the subject premises; in so doing, defendant Agosto used no unnecessary force or violence.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

37: There was probable cause for plaintiff's arrest.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

38: Plaintiff provoked any incident.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

39: Any injury alleged to have been sustained resulted from the plaintiff's own culpable or negligent conduct, and was not the proximate result of any act of defendant Agosto.

WHEREFORE, defendant SERGEANT JAVIER AGOSTO respectfully requests Judgment dismissing the amended complaint in its entirety, together with the costs and disbursements of this action, and such other and further relief as the Court may deem just and proper.

Dated: Garden City, New York
January 5, 2011

/s John V. Decolator
JOHN V. DECOLATOR, ESQ.
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